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8  
9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA (SAN JOSE)

11 Adobe Systems Incorporated,  
12 Plaintiff,  
13 v.  
14 Christopher Cain, an individual and d/b/a  
www.ascendancygroup.com, et al.,  
15 Defendants.

) Case No. C08-2435 RMW  
)  
) NOTICE AND MOTION FOR ENTRY OF  
) DEFAULT JUDGMENT;  
) DECLARATIONS AND EXHIBITS IN  
) SUPPORT  
)  
) Court: Hon. Ronald M. Whyte  
) Date: October 17, 2008  
) Time: 9:00 a.m.  
)

16  
17 TO THE COURT AND TO DEFENDANTS:


18 PLEASE TAKE NOTICE that on October 17, 2008, at 9:00 a.m., or as soon thereafter as  
19 the matter may be heard in the Courtroom of the Hon. Ronald M. Whyte, United States District  
20 Judge, located at Courtroom 6, 4<sup>th</sup> Floor of the United States District Courthouse, 280 South 1<sup>st</sup>  
21 Street, San Jose, California 95113, Plaintiff Adobe Systems Incorporated (“Adobe” or “Plaintiff”) will, and hereby does, move the Court for entry of default judgment against Defendant Christopher  
22 Cain, an individual and d/b/a www.ascendancygroup.com (“Defendant”), for statutory damages in  
23 the sum total of Two Hundred Fifty Thousand Dollars (\$250,000.00) and post-judgment interest  
24 calculated pursuant to 28 U.S.C. § 1961(a). Plaintiff also seeks entry of a permanent injunction  
25 prohibiting Defendant from further infringement of Plaintiff’s copyrights and trademarks.

26 By this Notice of Motion and Motion for Default Judgment, the Memorandum of Points  
27 and Authorities attached thereto, and the Declarations of Christopher D. Johnson, Chris Stickle,  
28 and Nicole L. Drey, and exhibits attached thereto, Plaintiff requests that a default judgment be  
entered based on the following points:

1. Defendant is not an infant or incompetent person, or in the military service or otherwise exempted under the Soldier's and Sailor's Civil Relief Act of 1940;
2. Defendant has not appeared in the action;
3. Although Plaintiff is not required to give notice due to Defendant's failure to appear, pursuant to Federal Rule of Civil Procedure 55(b)(2), this Notice and Motion for Default Judgment, along with all supporting papers is being served on Defendant on September 11, 2008, by placing true and correct copies thereof in sealed envelopes addressed to Defendant at the same address where service of process was completed.
4. Plaintiff elects statutory damages under the Lanham Act.
5. Plaintiff is entitled to judgment against Defendant based on violation of 15 U.S.C. §§ 1051 *et seq.*
6. The principal amount of the judgment sought as against Defendant is statutory damages in the amount of Two Hundred Fifty Thousand Dollars (\$250,000.00), as set forth in the accompanying Memorandum of Points and Authorities, supporting declarations and exhibits, and as authorized by 15 U.S.C. §§ 1116-1117. Plaintiff also seeks post-judgment interest calculated at the statutory rate pursuant to 28 U.S.C. § 1961(a), and entry of a permanent injunction prohibiting Defendant from further infringing any of Plaintiff's trademarks or copyrights.
7. This motion is based on this Notice of Motion, Motion for Entry of Default Judgment and accompanying Memorandum of Points and Authorities, the Declarations, and exhibits attached thereto, the exhibits and evidence to be presented at the hearing hereon, the pleadings, records and papers on file herein and such other matters and evidence as may be presented at or before the hearing.

DATED: September 11, 2008

J. Andrew Coombs, A Professional Corp.

By:   
J. Andrew Coombs  
Nicole L. Drey  
Attorneys for Plaintiff Adobe Systems Incorporated

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1 The Adobe Software is copyrightable subject matter, and Adobe owns exclusive rights  
2 under the Copyright Act to reproduce and distribute to the public copies of the Adobe Software in  
3 the United States including but not limited to such titles as Adobe *Acrobat*, *Creative Suite*,  
4 *Dreamweaver*, *Flash*, *Illustrator*, *PageMaker*, *Photoshop*, and *Shockwave*. Id. at ¶ 8. A non-  
5 exhaustive list of Adobe's copyright registrations is attached to the Complaint as Exhibit A  
6 ("Adobe's Copyrights").

7 Products manufactured and sold by Adobe also bear Adobe's trademarks, including  
8 without limitation, the ADOBE, ACROBAT, CREATIVE SUITE, DREAMWEAVER, FLASH,  
9 ILLUSTRATOR, MACROMEDIA, PAGEMAKER, PHOTOSHOP, POSTSCRIPT, READER  
10 and SHOCKWAVE trademarks (collectively "Adobe's Trademarks"). Compl. at ¶ 9. Adobe uses  
11 Adobe's Trademarks on computer software as indicia of Adobe's high quality products. Id. Each  
12 year Adobe expends significant resources to develop and maintain the considerable goodwill it  
13 enjoys in Adobe's Trademarks and in its reputation for high quality. Id.

14 All products described in the Complaint are sold with one or more of the Adobe  
15 Trademarks which are all valid, extant and in full force and effect. Adobe's Trademarks are  
16 exclusively owned by Adobe. Id. Adobe is the successor-in-interest to and exclusive owner in the  
17 United States of all copyrights, trademarks, trade dress and other proprietary in and to Adobe's  
18 Software including the following:

Trademark	Registration Number	Date of Registration
A	3032288	12/20/2005
A	2081343	07/22/1997
A	1998710	07/23/1996
A ADOBE	1901149	06/20/1995
ADOBE	3029061	12/13/2005
ADOBE	1988712	07/23/1996
ADOBE	1956216	02/13/1996
ADOBE	1475793	02/09/1988
ADOBE	1486895	05/03/1988
ADOBE PHOTOSHOP	1651380	07/23/1991
CREATIVE SUITE	3111341	07/04/2006
PHOTOSHOP	2920764	01/25/2005

1	PHOTOSHOP	1850242	08/16/1994
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2 Adobe's Trademarks are incontestable as Adobe, or its predecessors in interest, has  
3 continuously used each of Adobe's Trademarks from the registration date, or earlier, until the  
4 present and at all times relevant to the claims alleged in this Complaint. Id. at ¶ 10. As a result of  
5 advertising and sales, together with longstanding consumer acceptance, Adobe's Trademarks  
6 identify Adobe's products and authorized commercial distribution of these products. Id. at ¶ 11.  
7 Adobe's Trademarks have each acquired secondary meaning in the minds of consumers  
8 throughout the United States and the world. Id. Adobe's Copyrights and Adobe's Trademarks are  
collectively referred to herein as the "Adobe Properties".

9 **B. Defendant's Infringing Activities**

10 Defendant Christopher Cain is an individual and doing business as  
11 www.ascendancygroup.com. Compl. at ¶ 12. Cain is a resident of Staten Island, New York. Id.  
12 Defendant sold counterfeit copies of Adobe Software ("Unauthorized Software Product"). Id. at  
13 ¶¶ 15-16; Johnson Decl. at ¶¶ 3-6; Stickle Decl. at ¶ 4. Defendant, through his online identities,  
14 does business in California through sales and distribution of the Unauthorized Software Product in  
the State of California. Compl. at ¶ 12.

15 Adobe has not licensed Defendant to distribute its software, period. Compl. at ¶ 15.  
16 Instead, Defendant uses images confusingly similar or identical to Adobe's Trademarks to confuse  
17 consumers and aid in the promotion of their unauthorized products. Id. at ¶ 16. Defendant's use of  
18 Adobe's Trademarks includes importing, advertising, displaying, distributing, selling and/or  
19 offering to sell unauthorized copies of the Adobe Software. Id. Defendant's use began long after  
20 Adobe's adoption and use of Adobe's Trademarks, and after Adobe obtained its copyright and  
21 trademark registrations. Id. Neither Adobe nor any of its authorized agents have consented to  
Defendant's use of the Adobe Trademarks. Id.

22 Defendant's actions have confused and deceived the consuming public concerning the  
23 source and sponsorship of the unauthorized copies of the Adobe Software offered, sold and  
24 distributed by Defendant. Compl. at ¶ 18. By his wrongful conduct, Defendant has traded upon  
25 and diminished Adobe's goodwill. Id. Unless enjoined by this Court, Defendant will continue  
such unauthorized uses. Id. at ¶¶ 22, 28.

26 ///

27 ///

28 ///



1     **C.     This Action**

2             Plaintiff filed its Complaint on or about May 12, 2008. Plaintiff's Complaint alleges  
3     violation of 17 U.S.C. § 101, *et seq.* (copyright infringement) and violation of 15 U.S.C. § 1051, *et*  
4     *seq.* (trademark infringement).

5             Defendant was served with Summons and Complaint on or about June 5, 2008.  
6     Declaration of Nicole L. Drey ("Drey Decl.") at ¶ 2. The Clerk entered Defendant's default on  
7     August 6, 2008. *Id.* at ¶ 5. Despite Plaintiff's follow up efforts, Defendant has not filed a  
8     responsive pleading or otherwise appeared in this action. *Id.* at ¶ 4.

9                             **ARGUMENT**

10     **A.     Default Judgment Is Properly Entered Against Defendant**

11             In Eitel v. McCool, 782 F.2d 1470 (9th Cir. 1986), the Ninth Circuit outlined the following  
12     factors to determine whether to grant default judgment:

- 13                     (1) the substantive merits of plaintiff's complaint;  
14                     (2) the complaint's sufficiency;  
15                     (3) the amount of money at stake;  
16                     (4) the possibility of prejudice to plaintiff if relief is denied;  
17                     (5) the possibility of dispute as to any material facts;  
18                     (6) whether default resulted from excusable neglect; and  
19                     (7) the policy of the Federal Rules favoring decisions on the merits.

20     *Id.* at 1470-72.

21             Plaintiff meets each element.

22     **1.     Plaintiff's Complaint Sufficiently Charges Defendant with Trademark**  
23             **Counterfeiting**

24             The first two Eitel factors, involving the substantive merits of the claim and the sufficiency  
25     of the complaint, require that Plaintiff's allegations "state a claim upon which [it] may recover."  
26     Kloepping v. Fireman's Fund, 1996 U.S. Dist. LEXIS 1786 at \*5 (N.D. Cal. 1996), *citing* Danning  
27     v. Lavine, 572 F.2d 1386, 1388 (9th Cir. 1978). Upon a defendant's default, the factual allegations  
28     of the complaint, other than those relating to the amount of damages sustained, are deemed

1 admitted. Fed. R. Civ. P. 8(b)(6); Geddes v. United Financial Group, 559 F.2d 557, 560 (9th Cir.  
2 1977); Nishimatsu Construction Co., Ltd. v. Houston Nat'l Bank, 515 F.2d 1200, 1206 (5th Cir.  
3 1975).

4 The complaint sufficiently pleads Plaintiff's claim for trademark counterfeiting pursuant to  
5 15 U.S.C. §§ 1051, *et seq.* Plaintiff owns registered trademarks, and the Defendant distributed  
6 software bearing identical copies of its trademarks, all without Plaintiff's authorization. Compl. at  
7 ¶¶ 24-29; Johnson Decl. at ¶¶ 3-6, Exs. A-D; Stickle Decl. at ¶ 4. Defendant did so intentionally  
8 and his product was likely to cause confusion or mistake to the public regarding the affiliation,  
9 sponsorship, endorsement or approval of the unauthorized product. Compl. at ¶¶ 25-26. These  
10 allegations state claims for trademark counterfeiting upon which Plaintiff may recover.

11 To succeed on a claim under the Lanham Act, a plaintiff must establish that its mark is  
12 valid and has been infringed. 15 U.S.C. § 1114. Registration of a mark on the principal register is  
13 "prima facie evidence... of the registrant's ownership of the mark, and of the registrant's exclusive  
14 right to use the registered mark in commerce..." 15 U.S.C. § 1115(a); Vigil v. Walt Disney Co.,  
15 1995 U.S. Dist. LEXIS 15560, at \*5 (N.D. Cal. Oct. 16, 1995); Levi Strauss & Co. v. Blue Bell,  
16 Inc., 778 F.2d 1352, 1354 (9<sup>th</sup> Cir. 1985) (registration by the trademark holder constitutes *prima*  
17 *facie* evidence of a protected interest with respect to the good specified in the registration).  
18 Relevant registrations and their present validity and effectiveness are alleged in the Complaint and  
19 herein. Compl. at ¶¶ 9-11; Stickle Decl. at ¶ 3, Ex. E; Drey Decl. at ¶ 8.

20 The test for infringement of a federally registered trademark under the Trademark Act of  
21 1946 ("Lanham Act") is whether the alleged infringing act creates a likelihood of confusion. Two  
22 Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 769 (1992); Academy of Motion Picture Arts &  
23 Sciences v. Creative House Promotions, Inc., 944 F.2d 1446, 1454-55 (9th Cir. 1991). In  
24 determining likelihood of confusion, the Ninth Circuit has adopted the Sleekcraft test, balancing  
25 the following factors: (1) strength of the mark; (2) proximity of the goods; (3) similarity of the  
26 marks; (4) evidence of actual confusion; (5) marketing channels used; (6) type of goods and degree  
27 of care consumers are likely to exercise in purchasing them; (7) intent of the defendant in selecting  
28

1 the mark; and (8) likelihood that the parties will expand their product lines. AMF, Inc. v.  
2 Sleekcraft Boats, 599 F.2d 341, 348-54 (9<sup>th</sup> Cir. 1979). In addition, when the alleged infringer  
3 knowingly adopts a mark similar to another's, some courts presume that the public will be  
4 deceived. M2 Software, Inc. v. Madacy Entm't, 421 F.3d 1073, 1085 (9<sup>th</sup> Cir. 2005). These  
5 factors all demonstrate Defendant's infringement of Adobe's Trademarks:  
6

7 1. Strength of the Trademark: Plaintiff's trademarks are exceptionally strong as they  
8 identify Plaintiff's high quality products such that they have acquired secondary and distinctive  
9 meaning in the minds of consumers throughout the world as a direct result of Plaintiff's  
10 longstanding use, sales, advertising and marketing. Compl. at ¶¶ 9-11.

11 2. Proximity of goods: The likelihood of confusion is heightened where as here, the  
12 goods at issue are "related or complementary." M2 Software, Inc., 421 F.3d at 1082. Plaintiff has  
13 alleged that it lawfully advertises and sells products, including computer software and related  
14 merchandise, and that Defendant has, with actual and constructive notice of Plaintiff's federal  
15 registration rights, and long after Plaintiff established its rights in Adobe's Trademarks, adopted  
16 and used Adobe's Trademarks in conjunction with the manufacture, purchase, distribution, offer of  
17 sale and sale of computer software in the State of California and in interstate commerce. Compl. at  
18 ¶¶ 1-30. Defendant's products include computer software – a class of goods for which Plaintiff  
19 has numerous trademark registrations.

20 3. Similarity of the Marks: Defendant has sought to capitalize on Plaintiff's strong  
21 marks by copying them with no variation from their authorized versions with the intent to palm off  
22 such goods as those of Plaintiff. Defendant has caused to be imported, distributed, offered for sale  
23 and sold computer software bearing one or more of Adobe's Trademarks without authorization.  
24 Compl. at ¶¶ 15, 25.

25 4. Evidence of Actual Confusion: Purchases made by third-parties of Defendant's  
26 unauthorized, counterfeit product evidences actual confusion as to their source and origin.  
27 Johnson Decl. at ¶¶ 3-6.  
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1           5.     Marketing Channels Used: Defendant used the Internet to sell his infringing goods  
2 as “nachuri1.” Compl. at ¶ 12. Plaintiff uses the Internet as a channel through which to market  
3 legitimate product – through company owned sites such as adobe.com and third party retailers, a  
4 matter of which the Court can, if necessary, take judicial notice. Plaintiff also has an online  
5 commercial presence, resulting in significant overlap in advertising markets, which increases the  
6 likelihood of confusion. M2 Software, Inc., 421 F.3d at 1083.

7           6.     Type of Goods and Care Likely to be Exercised by the Purchaser: Defendant has  
8 duplicated Plaintiff’s products so that consumers, especially those shopping online, cannot  
9 differentiate between illegal and legitimate products at the point of purchase and tend to believe  
10 that Defendant’s computer software and related merchandise are authorized, sponsored, approved  
11 or associated with Plaintiff. Compl. at ¶ 25. Modern consumers, who are aware of the sensitivity  
12 of quality computer software look to Plaintiff’s marks for assurance of Plaintiff’s developed and  
13 maintained goodwill and reputation for high quality products. Id. at ¶ 9.

14           7.     Defendant’s Intent in Selecting the Mark: Defendant’s intention to confuse the  
15 public is self-evident. When a person knowingly adopts a mark identical to another’s mark, the  
16 Court may infer that person’s intent to confuse. M2 Software, 421 F.3d at 1085 (willful use  
17 creates a presumption of public deception).

18           8.     Likelihood of Expansion of Product Lines: Plaintiff is already using its trademarks  
19 in the class of goods and services exploited by Defendant. Furthermore, Defendant’s intention to  
20 expand its product line is irrelevant as Defendant is operating an illegitimate business practice  
21 whose existing product line consists of counterfeit goods.

22           Thus, Plaintiff is a valid trademark holder and has sufficiently alleged in its pleadings a  
23 likelihood of confusion under the Sleekcraft factors for its trademark infringement claim.

24           **2.     All of the Other Eitel Factors Have Been Met**

25           a.     Amount at Stake: Under the third Eitel factor, the Court must consider the amount  
26 of money at stake. Eitel, 782 F.2d at 1471-72. In the Complaint, Plaintiff prays for injunctive  
27 relief, statutory damages of up to One Million Dollars (\$1,000,000) for each trademark infringed  
28

1 upon by the Defendant if Defendant's acts are found to be willful, and attorneys' fees. Compl. ¶¶  
2 6-8; Prayer. By this motion, Plaintiff seeks permanent injunctive relief, \$250,000.00 in statutory  
3 damages as provided for in 15 U.S.C. § 1117 (c), and post-judgment interest.

4  
5 b. Possibility of Prejudice: The fourth Eitel factor considers whether Plaintiff will  
6 suffer prejudice if default judgment is not entered. Eitel, 782 F.2d at 1471-72. In light of the fact  
7 that Defendant declined to appear in response to proper service and his default was entered,  
8 thereby admitting the averments of the Complaint, Plaintiff will likely suffer prejudice if default  
9 judgment is not entered because Plaintiff will be without further options of recourse against  
10 Defendant.

11 c. Possibility of Dispute: The fifth Eitel factor requires the Court to consider the  
12 possibility of dispute as to any material facts in the case. Again, upon entry of default, all well-  
13 pleaded facts in the complaint are taken as true except those relating to damages. See TeleVideo  
14 Systems, Inc. v. Heidenthal, 826 F.2d 915, 917-18 (9th Cir. 1987); Fed. R. Civ. P. 8(b)(6). Here,  
15 Plaintiff filed a well-pled Complaint alleging the facts necessary to establish all of its claims. As  
16 Plaintiff's factual allegations are presumed true, no genuine dispute exists as to any material facts.

17 d. Possibility of Excusable Neglect: Under the sixth Eitel factor, the Court considers  
18 the possibility that Defendant's default resulted from excusable neglect. Due process requires that  
19 interested parties be given notice of the pendency of the action and be afforded an opportunity to  
20 present its objections before a final judgment is rendered. Mullane v. Central Hanover Trust Co.,  
21 339 U.S. 306, 314 (1950). Defendant was served the Summons and Complaint and contacted  
22 Plaintiff but defaulted. Drey Decl. at ¶¶ 2, 4. Defendant had ample time to try to resolve this  
23 matter but elected not to appear. Id. at ¶¶ 2-5. Defendant's voluntary decision to allow default to  
24 be entered contradicts any argument for excusable neglect.

25 The facts of this case are dissimilar from those in Eitel, in which the defendant's failure to  
26 answer constituted excusable neglect because the defendant believed the litigation was over, due to  
27 a final settlement agreement that subsequently dissolved. The defendant in Eitel, soon thereafter,  
28 filed an answer and counterclaim, even though it was beyond the 20-day period. Eitel, 782 F.2d at

1 1472. The Defendant in the present case has failed to act despite all opportunity to do so, with full  
2 knowledge that a lawsuit was filed against him and that it was his responsibility to respond.

3 e. Policy for Deciding on the Merits: The seventh Eitel factor takes into account the  
4 preference of the Federal Rules for deciding cases on the merits. Eitel, 728 F.2d at 1472.  
5 However, “this preference, standing alone, is not dispositive.” Kloepping v. Fireman’s Fund,  
6 supra, 1996 U.S. Dist. LEXIS 1786 at \*10. “While the Federal Rules favor decisions on the  
7 merits, they also allow for the termination of cases before the court can reach the merits....[t]hus,  
8 the preference to decide cases on the merits does not preclude a court from granting “default  
9 judgment.” Id. Under Fed. R. Civ. P. 55(a), default judgments are allowed. Here, Defendant  
10 failed to answer Plaintiff’s Complaint or to otherwise appear in the action. Allowing Defendant,  
11 who failed to defend this action, to proceed to trial would greatly prejudice Plaintiff. Judgment  
12 against Defendant is proper at this time.

13 **B. Plaintiff Has Met The Procedural Requirements for Entry of a Default**  
14 **Judgment**

15 Federal Rule of Civil Procedure 55(b) provides for a court-ordered default judgment  
16 following entry of default by the court clerk under Rule 55(a). Kloepping v. Fireman’s Fund,  
17 supra, 1996 U.S. Dist. LEXIS 1786 at \*3-4. Applications for default judgment generally require  
18 the moving party state: (1) when and against which party default was entered; (2) the  
19 identification of the pleading to which default was entered; (3) whether the defaulting party is an  
20 infant or incompetent person, and if so, whether that person is adequately represented; (4) that the  
21 Soldiers’ and Sailors’ Civil Relief Act of 1940 does not apply; and (5) that notice of the  
22 application has been served on the defaulting party, if required. All of these requirements have  
23 been met, as set forth in Plaintiff’s Notice of Motion for Default Judgment.

24 Plaintiff has complied with Fed. R. Civ. P. 54(c) and 55(a). In the pending action, Plaintiff  
25 served Defendant on or about June 5, 2008, and the Clerk entered Defendant’s default on or about  
26 August 6, 2008. Further, Defendant is not an infant, incompetent person, in the military, or  
27 otherwise exempt under the Soldiers’ and Sailors’ Civil Relief Act of 1940. Plaintiff does not  
28

1 request relief that differs from or exceeds that prayed for in the Complaint. Finally, Plaintiff is not  
2 required to give notice of this application due to Defendant's failure to appear. *See* Fed. R. Civ. P.  
3 55(b)(2); *see also United States v. \$250,000.00 in United States Currency*, 1997 U.S. App. LEXIS  
4 33174, at \*2 (November 17, 1997) ("notice prior to entry of default judgment is only required  
5 where the defaulting party has appeared in the action"); *Wilson v. Moore & Assocs., Inc.*, 564 F.2d  
6 366, 368-369 (9<sup>th</sup> Cir. 1977). Regardless, Plaintiff has served a copy of this notice and motion,  
7 along with all supporting papers, on Defendant on September 11, 2008, by placing true and correct  
8 copies thereof in sealed envelopes addressed to Defendant at the same address where service of  
9 process was completed.

10  
11 **C. Plaintiff Is Entitled to a Permanent Injunction**

12 Plaintiff has alleged in its Complaint, and has presented specific evidence, that Defendant  
13 has infringed its copyrights and trademarks by, *inter alia*, willfully and knowingly manufacturing,  
14 distributing, offering for sale and/or selling unauthorized product featuring the Adobe Properties.  
15 The Complaint further alleges that unless enjoined, said infringements will continue with  
16 irreparable harm and damage to Plaintiff. Compl. at ¶¶ 22, 28.

17 **D. Plaintiff Is Entitled to Statutory Damages of \$250,000.00 Based on Defendant's**  
18 **Willful Infringement of Its Trademarks**

19 Section 1117 of the Lanham Act allows a plaintiff to elect either statutory damages or  
20 actual damages for trademark infringement. 15 U.S.C. § 1117. Plaintiff elects statutory damages.  
21 Since Defendant acted willfully, Plaintiff is entitled to increased statutory damages awards of up to  
22 One Million Dollars per counterfeit mark per type of goods or services sold, offered for sale, or  
23 distributed. 17 U.S.C. § 1117(c)(2). Thus, Plaintiff is seeking a reasonable award under the  
24 Lanham Act of Two Hundred Fifty Thousand Dollars (\$250,000.00) for the willful infringement of  
25 its trademarks by Defendant.

26 **1. Defendant's Conduct Was Willful**

27 Defendant has elected not to defend this case and dispute any of Plaintiff's allegations in  
28 the Complaint. Thus, in light of Defendant's default, his willfulness as pled in the Complaint is

1 admitted.

2 Willful infringement carries a connotation of deliberate intent to deceive. Courts generally  
3 apply forceful labels such as "deliberate," "false," "misleading," or "fraudulent" to conduct that  
4 meets this standard. Lindy Pen Co. v. Bic Pen Co., 982 F.2d 1400, 1406 (9<sup>th</sup> Cir. 1993). Here,  
5 Plaintiff has alleged in its Complaint, Defendant's willfulness. Compl. at ¶¶ 1, 4, 20, 26.

6  
7 **2. Defendant Willfully Infringed Upon Adobe's Trademarks**

8 Adobe's ownership of Adobe's Trademarks cannot be disputed. Compl. at ¶¶ 9-11; Stickle  
9 Decl. at ¶ 3, Ex. E; Drey Decl. at ¶ 8. In any event, Adobe's ownership of these trademarks is  
10 uncontested as a result of Defendant's default. Adobe's Trademarks were duplicated in the  
11 Defendant's counterfeit merchandise. Compl. at ¶ 16; Johnson Decl. at ¶ 6, Ex. D; Stickle Decl. at  
12 ¶ 4. This evidence indicates Defendant's infringement of Adobe's Trademarks by systematically  
13 selling unauthorized product incorporating Adobe's Trademarks. Further, Plaintiff is seeking to  
14 recover from only a partial trademark list from that alleged in the Complaint and from those  
15 appearing on Defendant's counterfeit merchandise and has elected not to pursue statutory damages  
16 under the Copyright Act despite ability to do so. Thus, Plaintiff is entitled to the reasonable award  
17 requested.

18 **3. Plaintiff Is Entitled to \$50,000.00 for Each of Five Trademarks Based on**  
19 **Defendant's Willful Counterfeiting of Its Trademarks**

20 Plaintiff seeks Fifty Thousand Dollars (\$50,000.00) per trademark for a total of Two  
21 Hundred Fifty Thousand Dollars (\$250,000.00) for Defendant's infringement despite there existing  
22 cause for recovery based on more trademarks and other copyrights.<sup>2</sup> This is well within the  
23 statutory limits provided for pursuant to the Lanham Act and within the limits applicable to acts of  
24 innocent infringement. This amount is properly awarded given (i) Defendant's willful conduct;  
25 and (ii) Defendant's blithe disregard for the process of this Court.

26 <sup>2</sup> Despite Defendant's lack of response to Plaintiff's enforcement of its rights and all allegations in  
27 the Complaint deemed true based on Defendant's default, Complaint lists a number of valid  
28 trademarks and even more copyright registrations, while here, Plaintiff is seeking recovery based  
on only five of the trademarks, further evidencing the reasonableness of Plaintiff's statutory  
damages request.



1 Section 1117(c) provides, in pertinent part:

2  
3 In a case involving the use of a counterfeit mark (as defined in section  
4 1116(d) of title 15) in connection with the sale, or distribution of goods or  
5 services, the plaintiff may elect, at any time before final judgment is rendered by  
6 the trial court, to recover, instead of actual damages and profits under subsection  
7 (a) of this section, an award of statutory damages for any such use in connection  
8 with the sale, or distribution of goods or services in the amount of-

9 (1) not less than \$500 or more than \$100,000 per counterfeit mark per  
10 type of goods or services sold, offered for sale, or distributed, as the court  
11 considers just; or

12 (2) if the court finds that the use of the counterfeit mark was  
13 willful, not more than \$1,000,000 per counterfeit mark per type of  
14 goods or services sold, offered for sale, or distributed, as the court  
15 considers just.

16 15 U.S.C. § 1117(c)(1)-(2).

17 In determining such an award, the Plaintiff must establish that:

- 18 (1) Defendant intentionally used a counterfeit mark<sup>3</sup> in commerce- defining “counterfeit  
19 mark” as, an identical, non-genuine mark, in use by Plaintiff and registered in the same  
20 class of goods complained of without Plaintiff’s prior authorization;
- 21 (2) Knowing the mark was counterfeit;
- 22 (3) In connection with the sale, offering for sale, or distribution of goods; and
- 23 (4) Its use was likely to confuse or deceive.

24 State of Idaho Potato Commission v. G & T Terminal Packaging, Inc., 425 F.3d 708, 721  
25 (9<sup>th</sup> Cir. 2005).

26 As complained of in the Complaint, Defendant’s use constituted counterfeiting as he used

27 <sup>3</sup> Section 15 U.S.C. 1117 (c) refers to the definition in 15 U.S.C. § 1116 (d)(1)(B) as one that “is  
28 registered on the principal register in the United States Patent and Trademark Office for such goods  
or services sold, offered for sale, or distributed and that is in use, whether or not the person against  
whom relief is sought knew such mark was so registered.”

1 identical, non-genuine marks of marks already in use and registered in the proper class of goods by  
2 Plaintiff, on goods that were likely to cause confusion or deception to the consuming public with  
3 knowledge. Compl. ¶¶ 1, 3, 14-18, 25-29.

4  
5 If this Court were to award Plaintiff only minimal damages, then Defendant in this action,  
6 as well as future defendants, would be encouraged to ignore any legal actions taken by Plaintiff  
7 against them. The granting of the requested statutory damage award at this time will act to deter  
8 Defendant (and others) from violating Plaintiff's trademarks and otherwise violating Plaintiff's  
9 rights with relative impunity.

10 Defendant has chosen to permit the entry of his default. Because of Defendant's default,  
11 Plaintiff has no effective choice but to seek an award of statutory damages. Based upon a portion  
12 of Defendant's systematic, willful and felonious acts, Plaintiff is entitled to an award of statutory  
13 damages of Two Hundred Fifty Thousand Dollars (\$250,000.00) against Defendant.

14 **E. Plaintiff Is Entitled to Interest on the Judgment**

15 Plaintiff is entitled to post-judgment interest. "Interest shall be allowed on any money  
16 judgment in a civil case recovered in a district court." 28 U.S.C. § 1961(a). Post-judgment  
17 interest shall be calculated pursuant to the statutory rate based upon date of entry of the judgment.  
18 Id.; Carte Blanche (Singapore) Pte. v. Carte Blanche International, 888 F.2d 260, 269 (2d Cir.  
19 1989).

20 **CONCLUSION**

21 For the foregoing reasons, Plaintiff respectfully requests that it be awarded permanent  
22 injunctive relief enjoining Defendant from further violation of its rights. In addition, Plaintiff  
23 requests Judgment in its favor in the amount of Two Hundred Fifty Thousand Dollars  
24 (\$250,000.00) in Lanham Act statutory damages and post judgment interest.

25 DATED: September 11, 2008

J. Andrew Coombs, A Professional Corp.

26  
27 By: Nicole L. Drey  
J. Andrew Coombs  
Nicole L. Drey  
28 Attorneys for Plaintiff Adobe Systems Incorporated

**DECLARATION OF CHRISTOPHER D. JOHNSON**

I, CHRISTOPHER D. JOHNSON, declare as follows:

1. I am an attorney duly admitted to practice before the courts of the Central District of California. I am the owner and principal of Effective Piracy Enforcement, Inc. ("EPE"). Except as otherwise stated, I have personal knowledge of the facts set forth herein and, if called as a witness, I would testify as follows.

2. I served as an Assistant United States Attorney in the Central District of California for fourteen (14) years, including the Computer Crimes and Intellectual Property Enforcement Unit. During my employment as an AUSA, a significant portion of my time was spent prosecuting defendants charged with criminal violations of the Copyright Act. I was also employed as Vice-President for Anti-Piracy by The Walt Disney Company.

3. On or about January 11, 2008, I reviewed some auctions posted by an eBay user identified under the ID "nachuril." On or about that same date, I engaged in a transaction with "nachuril" for a copy of Adobe Photoshop CS3, which was advertised as "ADOBE PHOTOSHOP CS3 NIB – FULL RETAIL WITH BONUS VIDEO." A true and correct copy of the eBay listing for "ADOBE PHOTOSHOP CS3 NIB – FULL RETAIL WITH BONUS VIDEO" is attached hereto as Exhibit A.

4. I placed the winning bid of \$285.00 for "ADOBE PHOTOSHOP CS3 NIB – FULL RETAIL WITH BONUS VIDEO" and payment through PayPal was sent to eBay seller "nachuril," identified by eBay and/or PayPal as "ascendancygroup.com," with an email address of "cecaïn@si.rr.com." True and correct redacted copies of the printouts confirming my successful bid and payment for "ADOBE PHOTOSHOP CS3 NIB – FULL RETAIL WITH BONUS VIDEO" are attached hereto as Exhibit B.

5. On or about March 20, 2008, I received a package pursuant to the "ADOBE PHTOOSHOP CS3 NIB – FULL RETAIL WITH BONUS VIDEO" order. The return address on the package was "Ascendancygroup.com, 89 Davis Ave, Staten Island NY 10310." Also included in the package was an invoice with the following company information: "Nach Uri & Co.LLC, 89 Davis Avenue, Staten Island NY 10310; Phone: 347-682-4055; Fax: 718-524-7483; Email: cecaïn@nachuri.com." True and correct copies of the redacted shipping label and invoice are attached hereto as Exhibit C.

6. The package contained a total of one disc labeled "ADOBE PHOTOSHOP CS3" and another labeled "ADOBE CREATIVE SUITE 3" with packaging labeled with Adobe's

1 trademarks. True and correct copies of pictures of the discs and their packaging I received from  
2 "nachuri1" are attached hereto as Exhibit D. The discs and their packaging were then forwarded to  
3 Adobe Systems Incorporated.

4 7. I also conducted Internet research into the return address of the package which was  
5 traced back to a Christopher Cain.

6 I declare under penalty of perjury under the laws of the United States of America that the  
7 foregoing is true and correct.

8 Executed this 9<sup>th</sup> day of September, 2008, at Los Angeles, California.

9  
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11 \_\_\_\_\_  
12 CHRISTOPHER D. JOHNSON  
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**DECLARATION OF CHRIS STICKLE**

I, Chris Stickle, declare as follows:

1. I am employed by Adobe Systems incorporated ("Adobe") as its Enforcement Manager, Anti-Piracy. I have been employed by Adobe since 2005 and have had various responsibilities with respect to Adobe's intellectual properties since that time including those relating to the protection of Adobe's extensive portfolio of copyrights and trademarks. I submit this Declaration in support of Adobe's Motion for Entry of Default Judgment in the matter captioned Adobe Systems Incorporated v. Christopher Cain, et al. Except as otherwise stated herein or as the context may otherwise indicate, I have personal knowledge of the facts set forth herein and, if called as a witness, I could and would competently testify under oath as follows.

2. Significant aspects of Adobe's business include the merchandising and licensing of computer software products. Adobe's cutting edge products include without limitation, Adobe Photoshop CS3 and Adobe Create Suite 3 (collectively "Adobe's Software"). Through the expenditure of significant effort and substantial amounts in advertising, Adobe has developed and promoted the use of Adobe's Software to deliver superior programs to its customers, trusted by millions of people worldwide.

3. Adobe is the successor-in-interest to and exclusive owner in the United States of all copyrights, trademarks, trade dress and other proprietary in and to Adobe's Software including the following:

<b>Trademark</b>	<b>Registration Number</b>	<b>Date of Registration</b>
A	3032288	12/20/2005
A	2081343	07/22/1997
A	1998710	07/23/1996
A ADOBE	1901149	06/20/1995
ADOBE	3029061	12/13/2005
ADOBE	1988712	07/23/1996
ADOBE	1956216	02/13/1996

ADOBE	1475793	02/09/1988
ADOBE	1486895	05/03/1988
ADOBE PHOTOSHOP	1651380	07/23/1991
CREATIVE SUTTE	3111341	07/04/2006
PHOTOSHOP	2920764	01/25/2005
PHOTOSHOP	1850242	08/16/1994

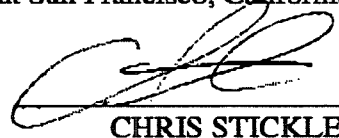
True and correct copies of printouts showing ownership of the trademark registrations listed above are collectively attached hereto as Exhibit E. The appearance and other features of Adobe's Software are inherently distinctive and serve to identify Adobe as the source of products bearing Adobe's trademarks and using Adobe's copyrights.

4. In connection therewith, I examined the discs and packaging for authenticity that I am informed and believe were purchased by EPE from "nachuri1". True and correct illustrations of the product and packaging reviewed are attached hereto as Exhibit D to the Declaration of Christopher D. Johnson. This product was determined to be counterfeit.

5. The counterfeit merchandise recreates various of Adobe's intellectual properties. This merchandise directly competes with similar products distributed and offered for sale by Adobe and its authorized licensees. Unauthorized merchandise which depicts Adobe's intellectual properties could mislead the consuming public into believing that they are buying authorized Adobe product which has met Adobe's rigorous standards. Adobe's reputation and goodwill is irreparably harmed as a result of sales of Defendants' inferior product.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 11<sup>th</sup> day of September, 2008, at San Francisco, California.

  
CHRIS STICKLER

**DECLARATION OF NICOLE L. DREY**

I, NICOLE L. DREY, declare as follows:

1. I am an attorney at law, duly admitted to practice before the Courts of the State of California and the United States District Court for the Northern District of California. I am an attorney for Plaintiff Adobe Systems Incorporated ("Plaintiff"), in an action styled Adobe Systems Incorporated v. Christopher Cain, et al. I make this Declaration in support of Plaintiff's request for Default Judgment against Defendant Christopher Cain, an individual and d/b/a www.ascendancygroup.com ("Defendant"). Except as otherwise expressly stated to the contrary, I have personal knowledge of the following facts and, if called as a witness, I could and would competently testify as follows:

2. On or about May 12, 2008, Plaintiff filed its Complaint. I am informed and believe that, on or about June 5, 2008, Defendant was served with the Summons and Complaint.

3. I am informed and believe that, on or about July 8, 2008, my office filed the Proof of Service with the Court.

4. On or about July 16, 2008, Defendant first contacted my office. Thereafter the Parties discussed the documentation that would be needed to engage in meaningful settlement negotiations, but Defendant has failed to produce any of the necessary disclosures. I am informed and believe that the last communication received from Defendant, despite several follow up attempts, was on or about July 16, 2008. I am informed and believe that Defendant has not filed a responsive pleading or otherwise appeared in this action.

5. I am informed and believe that, on or about August 4, 2008, my office filed a Request for Entry of Default with the Court. On or about August 6, 2008, the Clerk entered default against Defendant.

6. I am informed and believe that Defendant is not an infant or incompetent person.

7. I am informed and believe that Defendant is not currently serving in the military.

8. I request, pursuant to Federal Rules of Evidence, Rule 201(b) that the Court take judicial notice of copies of the Adobe registrations mentioned in the Declaration of Chris Stickle which have been attached hereto as Exhibit E.

9. On or about September 5, 2008, the Court entered a notice of Mail Returned, noting that certified mail sent to Defendant was returned as undeliverable. I am informed and believe that, as of September 10, 2008, Plaintiff has not received any of its mailings to Defendant returned as undeliverable.

10. I am informed and believe (and as reflected on proofs of service attached to the moving papers), that the Notice of Motion and supporting papers were served on the Defendant where service of process was effected, on September 11, 2008.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 11<sup>th</sup> day of September, 2008, in Glendale, California.

*Nicole L Drex*  
NICOLE L. DREX



### **PROOF OF SERVICE**

I, the undersigned, certify and declare that I am over the age of 18 years, employed in the County of Los Angeles, and not a party to the above-entitled cause. I am employed by a member of the Bar of the United States District Court of California. My business address is 517 East Wilson Boulevard, Suite 202, Glendale, California 91206.

On September 11, 2008, I served on the interested parties in this action with the:

- **NOTICE AND MOTION FOR ENTRY OF DEFAULT JUDGMENT;  
DECLARATIONS AND EXHIBITS IN SUPPORT**
- **[PROPOSED] ORDER**
- **[PROPOSED] JUDGMENT PURSUANT TO ENTRY OF DEFAULT**

for the following civil action:

Adobe Systems Incorporated v. Christopher Cain, et al.

by placing a true copy thereof in a sealed envelope. I am readily familiar with the office's practice of collecting and processing correspondence for mailing. Under that practice it would be deposited with the United States Postal Service on the same day with postage thereon fully prepaid at Glendale, California in the ordinary course of business. I am aware that on motion of the party served, service presumed invalid if postal cancellation date or postage meter is more than one day after date of deposit for mailing in affidavit.

Christopher Cain, an individual and  
d/b/a www.ascendancygroup.com  
89 Davis Ave.  
Staten Island, NY 10310

Place of Mailing: Glendale, California  
Executed on September 11, 2008, at Glendale, California

  
\_\_\_\_\_  
Nicole L. Drey